Case Number: 2409631/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms S Ditta

First Respondent: Mrs Crowther

Second Respondent: Miss A Wilkinson

Third Respondent: The Governing Body of St Peter's Primary School Church of England School Burnley

Heard at: Manchester **On:** 2 – 5 September 2024

Before: Employment Judge Childe

Mrs Radcliffe

Mr Williams

REPRESENTATION:

Claimant: In person represented by Mr Ditta (the claimant's brother)

Respondent: Mr Susak (Counsel)

REASONS

Summary of the case and Issues to be determined

1. This is a claim for direct religion discrimination, direct race discrimination and harassment related to religion and harassment related to race.
2. The claimant is a teaching assistant and remains employed by the third respondent, a primary school. The first respondent is the head teacher, and the second respondent is the deputy head teacher at the school.
3. The claimant brings a complaint of harassment relating to race and religion in connection with a WhatsApp message from 21 July 2020. More recently the claimant brings complaints of harassment related to race and religion, and direct race and religion discrimination in connection with events that took place between March 2022 and 27th of June 2022, about the third respondent's requirement that she attend swimming lessons with the children at the local swimming baths and the action the third respondent took about the claimant's choice of footwear when she was required to attend the swimming baths.

4. We spent some time at the outset of the hearing confirming the issues in dispute. These had been agreed by the parties in a previous case management hearing and are set out in full in the appendix to this judgment ("the Issues").

Introduction

5. We had access to an agreed tribunal bundle which ran to 295 pages.
6. Witness evidence was provided by the claimant herself and from Raymond Dickens, a former site supervisor of the third respondent. From the respondent, we were provided with witness statements from the first and second respondent, together with evidence from Lisa Duerden, school business manager.
7. The claimant produced witness statements from Sajida Hussain, Aneela Mahmood and Adam Broxton. However, they did not attend to give witness evidence and we therefore attached less weight to their evidence as it could not be challenged by the respondents.
8. On the morning of the first day of the hearing the claimant made an application to introduce the following into evidence:
    a. Additional documentary evidence.
    b. A supplementary witness statement for herself, which contained 57 additional documents.
    c. A transcript of a call between herself and Ms Duerden dated 8 November 2023 accompanied by a request that the tribunal listen to the recording.

    .

9. The tribunal considered the claimant's application and concluded that none of the documents should be introduced into evidence as they were not relevant to the issues in dispute nor were they necessary to enable the tribunal to determine the issues in this case. The documents and witness statement all related to matters that postdated the Issues or were said to go to the credibility of the claimant, none of which was relevant to the issues the tribunal had to determine.
10. The parties agreed that Lisa Duerden would give her evidence first, on the second day of the hearing, as she had childcare issues which meant it would be more difficult for her to give evidence later in the week.
11. On the third day of the hearing the respondent produced a timetable document, with the respondent said would help the tribunal determine issues 2.18 to 2.24 and 3.6 of the Issues. The claimant was given some time to consider this document and was given the opportunity to cross examine all witnesses on this document. After being given this opportunity, the claimant had no objection to it being introduced into evidence and we agreed it should be introduced into evidence.

Relevant law

Burden of Proof (section 136 Equality Act 2010 ("EqA 2010"))

12. The reversal of burden of proof applies under section 136 EqA 2010 'to any proceedings relating to a contravention of this Act'.
13. The EqA 2010 provides for a shifting burden of proof. Section 136 so far as relevant provides as follows:

(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

14. Consequently, it is for a claimant to establish facts from which the tribunal can reasonably conclude that there has been a contravention of the EqA 2010. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention.
15. If the claimant establishes a prima face case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong* and other cases 2005 ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.
16. *Efobi v Royal Mail Group Ltd 2021* ICR 1263, SC states that the issue for the tribunal, in deciding whether the burden of proof has shifted from the claimant to the respondent is whether, after hearing the evidence from all sources at the end of the hearing, the claimant has proved facts from which, absent any adequate explanation, the tribunal can infer that a disadvantageous decision is unlawful discrimination.

Time limits in discrimination cases

17. The relevant part of section 123 EqA 2010 state:

(1)… proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Direct discrimination (section 13 EqA 2010)

18. Under s13(1) of the EqA 2010 read with s9, direct discrimination takes place where a person treats the claimant less favourably because of disability than that person treats or would treat others. Under s23(1), when a comparison is

made, there must be no material difference between the circumstances relating to each case.'

19. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of disability. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was. (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11; [2003] IRLR 285)

Harassment

20. Section 26 of the EQA defines harassment as follows:

"(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic; and

(b) the conduct has the purpose or effect of:

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect".

21. The question of whether the respondent had either of the prohibited purposes – to violate the claimant's dignity or create the requisite environment – requires consideration of each alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before the Tribunal **GMB v Hennderson [2016] EWCA Civ 1049**.
22. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the claimant's perception of the impact on her (they must actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular claimant, the purpose of the remark, and all the surrounding context. That much is clear from section 26 and was confirmed by the Employment Appeal Tribunal in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724**. The words of section 26(1)(b) must be carefully considered. Conduct which is trivial or transitory is unlikely to be sufficient.
23. Mr. Justice Underhill, as he then was, said in that case:

"A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard …

whether it was reasonable for a claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …"

and

"…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"

24. Similarly in the case of **Land registry v Grant [2011] EWCA Civ 769**, Elias LJ as he became said, when discussing the descriptive language of subparagraph 1:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

25. It is for the claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If they do, then the respondent can have harassed them even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c).
26. Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be recognised that is not always easy to do so. Where there are several instances of alleged harassment, the tribunal can take a cumulative approach in determining whether the statutory test is met **Driskel v Peninsula Business Services Ltd. [2000] IRLR 151**.

Findings of Fact

27. We make the following relevant findings of facts. Where we have had to resolve any conflict of evidence to make a factual finding, we indicate how we have done so at the material point.
28. The claimant commenced employment for the third respondent as a teaching assistant on 1 April 2009. The claimant is a level 2A teaching assistant.

29. The claimant was a teaching assistant in key stage II, which is years three to six (ages 7-11), in the third respondent's primary school.
30. On 21 July 2020 the first respondent sent a message to all school staff on a group WhatsApp chat. The message read "*Happy Eid! Let's hope everyone celebrates safely so we're not locked down any more*!"
31. A Facebook post of Lisa Douglas was drawn to the claimant's attention shortly after she read this WhatsApp message. A colleague of the claimant, Khaleda Chowdhury, said to the claimant that the first respondent had liked a potentially inappropriate message directed at the Muslim community. We find the first respondent had not liked this message, instead she had expressed empathy for Lisa Douglas' grandfather by using a sad face emoji. The claimant accepted in evidence that she did not actually know whether the first respondent had liked the post on Facebook. The claimant didn't have a Facebook account and was relying on second-hand information from Khaleda Chowdhury. By contrast, the first respondent's evidence was straightforward and honest on this point, and we therefore preferred the first respondent's evidence that she did not *like* the post on Facebook, as the claimant had been told.
32. On 20 July 2021 the first respondent sent a second Whatsapp message which stated *"May your faith and love for Allah be rewarded with peace, happiness, and successes for today and always. May the joy of Eid surround you and your family. Wishing you a joyful Eid ul Adha! Have a fantastic break everyone, we have certainly earned it. An incredibly challenging year but what a team, we have pulled together, supported one another and made it through! Now relax!"*
33. Shortly after 20 July 2021, the claimant exchanged a WhatsApp message with a colleague, Rachel Smith, in which Rachel Smith said *"remember when [the*

first respondent] texted that last year?" and the claimant replied *"yeah I do remember that. She was out of order."*

34. From April 2022 the claimant was required to attend the swimming baths twice a week to acompany the year four and year five students when they were carrying out their swimming lessons.
35. The year four swimming lessons were held on a Tuesday afternoon each week.
36. The unchallenged evidence we heard from the respondent, and which we accepted, was that the TAs required to attend the year four swimming lessons on a Tuesday afternoon had to be drawn from key stage II, due to the conflict in timetables between key stage I and key stage II students.
37. We heard unchallenged evidence from the respondents that the pool of TAs in key stage II was therefore the claimant, Mrs Craggs, who was a level 3 TA and could cover a qualified teacher's class in their absence, and Mr Rainbird who spoke fluent French.
38. The respondents chose the claimant to attend the year four swimming lessons on a Tuesday afternoon because they needed a female TA and the only other female TA in key stage II, Mrs Craggs, was covering Mr Crotty's afternoon class on Tuesday whilst he carried out his preparation planning and assessment. The claimant could not do this because she was not a level 3 TA and therefore couldn't cover Mr Crotty's class in his absence.
39. Mr Rainbird taught French across several classes on a Tuesday afternoon as he was fluent in French.
40. There wasn't a written dress code between April – June 2022. The code was rather that staff should dress in a way that is appropriate for a school setting.

41. In June 2021, some white British staff were not following this informal code by wearing strappy tops or coming in in gym kit. One of those members of staff, Lisa Douglas, was spoken to directly about this at the time and told to dress appropriately. The claimant did not challenge this evidence.
42. In addition, all staff sent email on 21 June 2021 which covered the appropriate wearing of strappy/sleeveless tops and footwear.
43. The claimant lodged a grievance on 28 July 2022. The grievance ran its course and grievance appeal outcome was provided to the claimant on 10 November 2022.
44. The claimant first contacted ACAS regarding this claim on 23 November 2022 and the ACAS certificate was issued on 25 November 2022.
45. The claimant lodged her complaint in the employment tribunal on 3 December 2022.

Analysis and conclusion

46. The structure we adopt in our analysis and conclusion is to follow the Issues, using the numbering adopted in the Issues. 1.Time limits

1.1 Were the harassment discrimination complaints made within the time limit in section 123 of the Equality Act 2010?

1.1.1 Were the claims made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?"

47. Turning initially to the WhatsApp message dated 21 July 2020, issue 2.1 in the Issues ("the Whatsapp Message allegation"). We find that this was a one-off

message which was not conduct extending over a period. There has been no suggestion from the claimant that the first respondent repeated the contents of that message at any other time and indeed the only other message that the first respondent sent about the Eid celebration was overwhelmingly positive, as described in paragraph 32 above and which the claimant did not take issue with.

48. With regards to all other allegations identified in the Issues, we find that these allegations all amounted to conduct extending over a period time up to and including when the claimant first contacted ACAS to start early conciliation, which was 23 November 2022. The reason for this is that the claimant is still required to wear appropriate footwear at the swimming baths (issues 2.6, 3.1 and 3.2). We find the allegation that Mr Edgard was asked to spy on the claimant (issues 2.12 and 3.5) in relation to her footwear is connected to the ongoing requirement to wear appropriate footwear and we find the claimant is still required to accompany the children to two separate swimming sessions per week for the third respondent (issues 2.18 and 3.6).

49. We therefore conclude that the Whatsapp Message allegation was not made to the tribunal within three months (allowing for any early conciliation extension) of 21 July 2020, which is when the Whatsapp Message was sent and is therefore the act complained of. The cutoff point for time limits purposes is 20 October 2020 (three months less one day from 21 July 2020) ("the Primary Limitation Period"). The claimant first contacted ACAS to commence early conciliation on 23 November 2022 which was outside the Primary Limitation Period.

50. All other complaints in the Issues were ongoing at the point the claimant first contacted ACAS to commence early conciliation on 23 November 2022. The ET1 was then lodged on 3 December 2022, following the early conciliation extension, which was within three months (allowing for any early conciliation extension) of the acts to which the complaint relates.

1.1.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

51. We find all claims in the Issues other than the WhatsApp Message allegation are therefore in time.

1.1.4 If not, were the claims made within such further period as the tribunal thinks is just and equitable? The tribunal will decide:

1.1.4.1 Why were the complaints not made to the tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

52. As we have said, the WhatsApp Message allegation was not lodged with the tribunal as a claim within three months (allowing for any early conciliation extension) of the message being sent. In fact, the claimant first contacted ACAS about this allegation on 23rd November 2022 over two years and three months after the WhatsApp message was sent.
53. The next question for the tribunal is whether the Whatsapp Message allegation was made within such further period as the tribunal thinks is just and equitable?
54. The reason the claimant has given in submissions for not lodging the Whatsapp Message allegation claim in time is because she was following the

grievance procedure, and she lodged her claim form within three weeks of the grievance appeal concluding.

55. We find that the claimant did not lodge a grievance into the WhatsApp Message allegation until 28 July 2022 (as per paragraph 43 above), just under two years after the WhatsApp message was sent. No reason has been given by the claimant for why this allegation couldn't have been raised as a claim within three months of the WhatsApp message being sent in July 2020.
56. The respondents are prejudiced by having to deal with this allegation over four years after it took place. The first respondent is required to recall specific factual matters that relate to this allegation and the context in which it was made (during a period where COVID restrictions were in place), over four years after it took place. Memories have faded and it is more difficult for the first respondent to remember this detail and context, following this period. We therefore conclude it's not just and equitable to extend time.
57. Whilst we have concluded that the WhatsApp Message allegation is out of time, in case we are wrong on this, we give the tribunal's judgement on this allegation, together with all other Issues in this case.

2. Harassment related to Religion and/or Race (Equality Act 2010 section 26)

The WhatsApp Message

2.1 Was the WhatsApp message sent by the first respondent on 21 July 2020 unwanted conduct?

58. We find that the WhatsApp message was unwanted conduct. It's clear from the text message that the claimant sent at the time to Rachel Smith, and indeed

a year later (referred to in paragraph 33 above), that the claimant found this message unwanted.

2.2 If so, in what way was it unwanted conduct?

59. The reason it was unwanted conduct was because, in the claimant's view, the comment "*let's hope everyone celebrates safely so we're not locked down anymore!*" was the first respondent making a racist stereotype, connected to the claimant's religion, that Muslims were not following lockdown restrictions during COVID.

2.3 Was that conduct related to the claimant's religion?

60. Yes, it was, because it related to the celebration of Eid which is a day, usually, where many Muslims will go to special prayers at their local mosque and have a day of celebrations with family and friends.

2.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

61. We find the conduct did not have the purpose of violating the claimant's dignity for creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.
62. The first respondent gave context for the reason she said in the WhatsApp message *"let's hope everyone celebrates safely so we're not locked down anymore!".* The first respondent's evidence was that in late July 2020 everybody in the country was required to socially distance and the UK

government were discussing re-imposing lockdown sanctions to prevent the further spread of Covid.

63. Notwithstanding the requirement to socially distance, some of the children in the school, from both Muslim Asian and other ethnic backgrounds, had told the teachers about some of their weekend plans and their plans to celebrate Eid, which if correct, would have resulted in those families not following social distancing and in turn might have meant the further spread of COVID or that further lockdown restrictions were required.
64. The first respondent explained how the school had had to engage in discussions with some parents about the school's concerns regarding what the children had told them.
65. We found the first respondent's evidence to be honest and straightforward on this point and we've accepted her evidence on this point. What she has told us correlates to the timeline of UK government coronavirus lockdown's measures during this period. We note that on 4 July 2020 the U.K.'s first local lockdown in Leicester was imposed, due to the spread of coronavirus, following the relaxation of lockdown earlier in the year.
66. We also considered the similar WhatsApp message sent the following year on 20 July 2021 which states "*May your faith and love for Allah be rewarded with peace, happiness, and successes for today and always. May the joy of Eid surround you and your family. Wishing you a joyful Eid ul Adha! Have a fantastic break everyone, we have certainly earned it. An incredibly challenging year but what a team, we have pulled together, supported one another and made it through! Now relax!"* At this time, in July 2021, most legal limits on

social contacts were removed in England. There is no reference in the WhatsApp message to the need for anyone to celebrate safely.

67. There was no suggestion in the 2020 WhatsApp message that Muslims or those of Asian ethnicity were not following social distancing rules during COVID. Rather the first respondent had a genuine concern that the children and adults in the school community were not following the social distancing restrictions, and this might have meant that further local lockdown restrictions would be imposed due to the spread of COVID. There was no suggestion in this message that Muslims were not following social distancing restrictions during COVID. Rather there was a genuine concern that the children and adults in the school community of a range of ethnic backgrounds were not following the social distancing restrictions, and this might have meant that lockdown was extended due to the spread of COVID.

68. We therefore conclude that the purpose of the July 2020 WhatsApp message was to express the first respondent's hope that everyone celebrated Eid safely by not breaching social distancing rules and meeting with friends and family because at that time there was a real risk that the country would be placed into lockdown if social distancing rules were not observed by the UK public. That’s why the 2020 WhatsApp message contain this statement whereas the 2021 one did not. It wasn’t for the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

*2.5 If not, did it have that effect? In an effect case only, the Tribunal will take into account the claimant's **perception**, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

69. We are bound to follow the case law when deciding whether the WhatsApp message have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We must look at the claimant's own perception but also the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
70. The case law tells us that trivial content is unlikely to be sufficient to establish harassment. In other words, there is an objective standard, and we must decide as a matter of fact whether it was reasonable for the claimant to have considered her dignity to be violated by the 2020 WhatsApp message.
71. Violating a person's dignity and intimidating behaviour are strong words which will usually require evidence of serious marked effects. A comment may have a different weight if it was innocently intended rather than intended to hurt.
72. We of course must be sensitive to words which can imply racially offensive meaning, but we must be aware that sometimes individuals may be hypersensitive and that this does not mean an unfortunate phrase or comment is necessarily an act of discrimination.
73. The first respondent accepted that the phrase she used, *"let's hope everyone celebrates safely so we're not locked down anymore!"*, in the 2020 WhatsApp message was unfortunate. Had she been aware at the time that this commented caused offence, she gave evidence, which we accepted, that she would have taken action to put matters right.

74. We start from the premise that the actual words used in the 2020 WhatsApp message were not offensive in themselves and we have already found at paragraphs 67 and 68 that they were not intended to cause harm to the claimant or any other member of Muslim faith or of Asian ethnicity.
75. The claimant said in evidence that part of the reason why she was offended by this 2020 WhatsApp message was because of a Facebook post of Lisa Douglas that was drawn to her attention shortly after she read the 2020 WhatsApp message. As we have found at paragraph 31 above, the claimant was wrong on this point and the first respondent had not *liked* this message, instead she had expressed empathy grandfather by using a sad face emoji.
76. Whilst there is evidence from the text messages between the claimant and Rachel Smith (referred to in paragraph 33 above) that even a year on the claimant was offended by this comment, she did not raise it as a grievance at the time or indeed anywhere near the time the message was sent, despite the respondent having a grievance procedure.
77. Overall, we conclude it was not reasonable of the claimant to consider herself harassed by the 2020 Whatsapp comment. The words in the 2020 Whastapp comment were not offensive. There was no intention to cause harm. It's not obvious from a reading of the message that it is offensive. It's clear, given the context, the social distancing restrictions and the possibility of lockdown, that the purpose of the message was to hope everybody celebrating Eid observed social distancing, to ensure there was no requirement for the region or indeed the country to go into lockdown. It cannot reasonably be read into that message, given the context, that the 2020 WhatsApp message related to religion and a stereotype of Muslims did not follow lockdown during COVID.

78. The claimant had misunderstood how the first respondent had responded to the Facebook comment and had wrongly drawn the conclusion that the first respondent was hostile to those of Muslim faith or of Asian ethnicity.
79. We therefore conclude that the claimant was not harassed by the 2020 WhatsApp comment.

Dress Code/Swimming Baths & Spying"/Swimming Baths

2.6 From March 2022 to 27 June 2022, did the respondents single the claimant out for wearing inappropriate footwear at the swimming baths when other white or non-Muslim members of staff were permitted to wear inappropriate footwear at the swimming baths? Was the claimant also singled out for not complying with the school's staff clothing policy when in the school?

2.12 Did the respondents cause Mr Edgar to spy on the claimant at the swimming baths on 27 June 2022 to determine if the claimant was wearing appropriate footwear?

80. The claimant bears the initial burden of proof. It is for the claimant to demonstrate some facts which could lead the tribunal to conclude that unlawful harassment or indeed direct discrimination has taken place.
81. The claimant agreed, in evidence, that the respondent's conduct in relation to the dress code and swimming baths, and the spying allegation was not connected to race or religion.
82. For this reason, these claims fail.

Ordered to attend additional swimming classes

2.18 Did the respondents order the claimant to attend two swimming sessions per week from April 2022 to 27 June 2022 instead of one and if so, why?

83. Yes, the respondent did require the claimant to attend two swimming lessons per week from April 2022 to 27 June 2022.

2.19 Was the claimant singled out from other teaching assistants by being made to attend the swimming baths twice a week and if so, why?

84. The claimant was required to attend the swimming baths twice a week and therefore in that sense she was singled out from the other teaching assistants (the "TAs"). The reason for this is as follows.
85. One of the two swimming lessons, which was the one the claimant took exception to having to attend, was with year four on a Tuesday afternoon each week.
86. As we have found at paragraphs 36 to 39 above:
    a. The TAs required to attend the year four swimming lessons on a Tuesday afternoon had to be drawn from key stage II, due to the conflict in timetables between key stage I and key stage II.
    b. The pool of TAs in key stage II was therefore the claimant, Mrs Craggs, who was a level 3 TA and could cover a qualified teacher's class in their absence, and Mr Rainbird who spoke fluent French.
    c. The respondents chose the claimant to attend the year four swimming lesson on a Tuesday afternoon because they needed a female TA and the only other female TA in key stage II, Mrs Craggs, was covering Mr

Crotty's afternoon class on Tuesday whilst he carried out his preparation planning and assessment. The claimant could not do this because she was not a level 3 TA and therefore couldn't cover Mr Crotty's class in his absence.

87. It was suggested by the claimant that Mr Rainbird could cover Mr Crotty's Tuesday afternoon class, releasing Mrs Craggs to attend the year four swimming lesson. However, the first Respondent and the second Respondent explained this was not desirable because Mr Rainbird taught French across several classes on a Tuesday afternoon as he was fluent in French.
88. We have accepted the first Respondent and the second Respondent's evidence on this point in its entirety. We've carefully considered the timetable and the evidence we were given.

2.20 Was the above unwanted conduct.

89. We have accepted the claimant found the requirement to attend to swimming sessions per week unwanted conduct.

2.21 If so, in what way was it unwanted conduct?

90. The swimming baths were warm, and the claimant did not like to attend with the children and be in a warm environment.

2.22 Was that conduct related to the claimant's race or religion?

91. We find that the reason the decision was made that the claimant attend the year four swimming lesson on a Tuesday afternoon was to make the best use of TA resources to enable the children to get the best education possible, and

benefit from a French class taught by a fluent French speaker, as set out in paragraph 87 above.

92. Given this finding, we have concluded that this decision was not related to the claimant's race or religion.
93. This allegation therefore fails.
94. For this reason, we do not need to go on to consider whether the conduct had the purpose or effect of violating the claimant's dignity as set out in issues 2.23 and 2.24 of the Issues.

Direct Religion or Race Discrimination

3.1 What actions, if any, did the respondents take in regard to the claimant after the swimming instructor Amanda complained to the respondents about the claimant wearing high heeled wedged shoes at the swimming baths?

95. As we have found at paragraph 81, the claimant has accepted that the action the respondent took about the claimant wearing high-heeled shoes pool were not connected to race or religion and therefore not because of race or religion and therefore the claim for direct discrimination at 3.1 must fail.

3.2 Was the claimant singled out for special attention in regard to her dress and compliance with the school's dress code?

3.3 If she was singled out, what was the reason? Was it because or partly because of her race or religion.

96. We find that the claimant was not singled out for special attention regarding her dress and compliance with the school's dress code. The only allegation which relates to the period covered by this claim relates to the claimant not wearing suitable shoes at the swimming pool.
97. The claimant accepted in evidence that this action taken by the respondent was not done or race and therefore it must fail.

3.4 Were breaches of the school's dress code by white non-Muslim staff ignored when breaches by the claimant were not?

98. We have heard unchallenged evidence from Lisa Duerden that staff members were challenged when they were in breach of the dress code.
99. There wasn't a written dress code between April – June 2022. The code was rather that staff should dress in a way that is appropriate for a school setting.
100. We heard that in June 2021, some white British staff were not following this informal code by wearing strappy tops or coming in in gym kit. One of those members of staff, Lisa Douglas, was spoken to directly about this at the time and told to dress appropriately.
101. In addition, all staff sent email on 21 June 2021 which covered the appropriate wearing of strappy/sleeveless tops and footwear.
102. We have accepted evidence of Lisa Duerden that this policy was enforced across the school.
103. We therefore conclude that breaches of the school's dress code by white non-Muslim staff were not ignored as alleged by the claimant.

3.5 Did the first respondent ask or direct Mr Edgar to report back to her on what footwear the claimant was wearing at the swimming baths? If she did, why?

104. This claim fails for the same reason that the harassment claim fails, as set out in paragraph 81 above, because the claimant has accepted that this decision was not connected to her religion or race and equalling it was not done because of her religion or race.

3.6 Was the claimant ordered by any of the respondents to attend a second swimming class each week from April 2022 to 27 June 2022? If so, why was the claimant so selected over other Teaching Assistants?

105. We have already found at paragraph 83 above that the claimant was required to attend an additional swimming class each week.

106. We have set out the reason why the claimant was selected over the other TAs at paragraph 91.

3.7 Did the claimant reasonably see the treatment as a detriment?

107. Yes, we find the claimant reasonably perceived this as a detriment. It was hot in the swimming baths and the claimant didn't enjoy attending, as we have found at paragraph 90 above.

3.8 If so, has the claimant adduced facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different religion or race was or would have been treated? The claimant relies on a real comparator of Ms Rachel Smith for her religion and race discrimination claim relating to footwear worn at the swimming baths.

108. No, the claimant has not.

109. The other key stage II TA's who were not required to go to the swimming baths on a Tuesday afternoon were not in the same situation as the claimant as they had different qualifications and skills, for the reasons set out in paragraphs 86 to 88 above.

110. The reason the claimant had been sent to the swimming baths on a Tuesday afternoon is as we have already said at paragraph 91 above and not because of the claimant's religion or belief.

Employment Judge Childe

17 October 2024

JUDGMENT SENT TO THE PARTIES ON

24 October 2024

FOR THE TRIBUNAL OFFICE

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